

Contradiction and Legislation Regarding the Right to Life

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Unborn Human Life and Fundamental Rights: Leading Constitutional Cases under Scrutiny. Edited by Pilar Zambrano and William Saunders, with concluding reflections by John Finnis. Berlin: Peter Lang, 2019.

The most fundamental principle of law is the principle of non-contradiction. This is Thomas Aquinas's position in the seminal article on the natural law, *Summa theologiae* I-II, question 94, article 2, where, citing Aristotle, he formulates the principle as, "One should not simultaneously affirm and negate." Later in the same article, Thomas offers a practical formulation of the same principle, "Good is to be done and pursued and evil avoided"; but in law, since it is contained in propositions (affirmations and negations) as distinct from ideas regarding the pursuit of goods, the prior formulation is the more immediately relevant of the two.

The book under review is important in that, by going through the legal history regarding abortion and related issues in a number of different countries—the United States, Canada, Italy, Spain, Poland, Ireland (*Eire*), Costa Rica, Argentina, Chile, Mexico, and Peru—it causes to emerge any number of times the realization that legislation and judicial decisions in favor of abortion "rights" invariably infect a legal system with contradictions and inconsistencies of various sorts. The present essay is, therefore, not your typical book review. Its objective is simply to list some of the legal contradictions and inconsistencies identified by the book's various authors as they describe the legal status of the unborn in their respective nations.

William Saunders's very clear and comprehensive first chapter is entitled, "Judicial Interference in the Protection of Human Life in the United States: Actions and Consequences." In it, he describes, among other things, the Human Cloning Prohibition Act passed by the U.S. House of Representatives in 2003, which prohibited "any person or entity, public or private" from performing human cloning (23). He speaks also of a bill proposed in the U.S. Senate once the Human Cloning Prohibition Act had passed in the House of Representatives. This Senate bill (which was entitled, "The Human Cloning Ban and Stem Cell Research Protection Act") would have prohibited "any person or other legal entity" from conducting human cloning, even while allowing nuclear transplantation, which it defines as "transferring the nucleus of a human somatic cell into an oocyte from which the nucleus . . . ha[s] been . . . removed or rendered inert." The problem here, as Saunders explains, is that this latter definition "is the very definition of cloning" (25). In other words, in the same year, two pieces of legislation were considered in the Congress of the United States, both purporting to ban human cloning, one of which would have permitted what the other described (correctly) as human cloning and so prohibited.

In the second chapter, "Whither United States Abortion Law?" by Gerard V. Bradley, discussed, among other things, is the inconsistency between the United States Supreme Court's pro-abortion decision *Roe v. Wade* and various laws, both state and federal, prohibiting feticide. Bradley says of the 2004 federal Unborn Victims of Violence Act that, "in pertinent part it says that 'whoever' 'causes the death of or bodily injury to,' a 'child who is *in utero*' is guilty of an offense apart from any accompanying offense against the woman carrying the child." The penalty for such an act is the same as would be imposed if the act were inflicted upon the unborn child's mother: if, for instance, the mother was killed. "A child *in utero*," reports Bradley, "is defined as a member of the species *homo sapiens*, at any stage of development, who is carried in the womb" (37).

The problem here is that prosecutable under this law are acts identical with those performed legally by abortionists. Bradley mentions two cases in which a woman's male partner—in one case the woman's husband—effected by stealth the abortion of her child. In one case, the male purchased abortion pills and affixed to their container a pharmacy label indicating that it contained a common antibiotic; in the other, the husband obtained the same type of pills (Misoprostol), ground them into a powder, and put the powder into his wife's food and drink. In both cases, writes Bradley, "an unborn child's father effectively performed an abortion by the same means and for the same sorts of reasons that the child's mother could have chosen

to abort as a matter of right" (38). There is a way of pushing aside this inconsistency: one can invoke the principle that a woman has the "right" to control her own body. But that solution does not address the combined facts that (1) the males in these two cases were prosecuted for the murder of a human person and (2) the basis of the supposed right invoked depends on decisions (such as *Roe v. Wade*) which decline to consider the question whether the embryo *is* a human person.

In chapter 3, "Canada's Abortion Jurisprudence: The Creep of Procedural Rights and the Reinterpretation of Liberty," Dwight Newman points to a lack of consistency in the philosophical presuppositions of decisions by the Supreme Court of Canada related to the rights of the unborn and other issues. In 1982 Canada adopted a written constitutional bill of rights called the "Canadian Charter of Rights and Freedoms." This charter makes no mention of abortion, although its section 7 has been used to ground a right to abortion. It reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof *except* in accordance with the principles of fundamental justice" (56; emphasis added).

Legally, argues Newman, it would be possible to place limits on the liberty mentioned in section 7 by invoking the charter's section 1, which states that the charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Unfortunately, however, with respect to abortion, section 7 has been used as the basis for the claim that no limits whatsoever might be imposed upon a woman's liberty with respect to abortion. Section 1—at least up until the present day—has been ignored. Newman sees in this emphasis on the freedom mentioned in section 7 a certain "atomization" of society: an over-emphasis on the individual.

Newman also demonstrates that, when this inviolability of a woman's freedom proves inconvenient in view of other political or legal goals, it is shunted aside. He considers a Supreme Court case (*Canada v. Bedford*, 2013) in which were struck down a number of laws against prostitution. The basis of the decision, which was very much in line with Chief Justice Beverley McLachlin's characteristic jurisprudence, was the inviolable freedom of prostitutes. And yet, when confronted by the argument that "the harms from the law were not caused by the law or the state but by choices made by individuals involved in prostitution," Chief Justice McLachlin argued that "because of financial desperation, drug addictions, mental illness, or compulsion from pimps," the prostitutes are not truly choosing to engage in prostitution. Writes Newman:

Although there is much truth in this statement, it suggests that Chief Justice McLachlin seeks simultaneously to justify respect for personal decisions on assumptions of individual freedom and its normative force *and* to justify ignoring certain effects of individual “choices” based on assumptions of a more social scientific model of the person. (66; emphasis added)

In other words, when it proves convenient, the chief justice moves away from her characteristic atomistic understanding of society and towards one in which, for instance, limits could be placed on prostitution in the best interest of the larger society in which individual freedoms are exercised.

In chapter 4, “To Be and Not to Be: The Uncertain Identity of Unborn Children in Italian Case Law,” Salvatore Amato considers, among other laws, what he calls the Abortion Act (of 1978) and the Assisted Fertilisation Act (of 2004). Article 1 of the former does say that the state “recognizes the social value of maternity and protects human life from its beginning,” but leaves unaddressed the question of *when* human life begins (whether, for instance, at conception, or implantation, or birth). In effect, the Abortion Act provides no real protection to the life of the embryo or the fetus. On the other hand, article 14 of the Assisted Fertilisation Act prohibits “cryopreservation and the destruction of the embryos,” although in the same breath it says that this prohibition must take into consideration the Abortion Act. Amato notes that this combination of laws leads to

the paradox that the embryo, a life which is about to develop, can never be destroyed, whilst the foetus, a life which is already considerably formed, can be destroyed under certain conditions. Taking this interpretation to the extreme, a woman would be obliged to undergo the implantation of the embryos, even against her will, but could subsequently ask for the authorization to have an abortion. (79)

Chapter 5, “Leading cases from the Spanish Constitutional Court concerning the Legal Status of Unborn Human Life,” is written by Angel J. Gómez Montoro. In it, he begins with some elements of Spanish law that go some way toward protecting the lives of the unborn. The Spanish Constitution, adopted in 1978, states in section 15 that “everyone has the right to life and to physical and moral integrity.” In the deliberations leading up to the Constitution’s adoption, deliberately rejected was wording that would have spoken rather of the right of the *person* to life and so on, because that would have allowed room for declaring the embryo or the

fetus not yet a human person (84). Moreover, in deciding a case in 1985 (STC 53/1985), the Constitutional Court of Spain stated that human life begins with gestation and that gestation results in “a *tertium* existentially distinct from the mother” (89).

In the late 1990s, however, the Constitutional Court issued rulings having to do with *in vitro* fertilization and the use of embryonic organs and tissues that are at the very least difficult to reconcile with the former decisions. In two of these rulings (STC 212/1996 and STC 116/1999), the idea emerges that the “pre-embryo”—that is to say, the pre-implantation embryo—is “non-viable” (102). The non-viability of an embryo is, therefore, understood as depending on the decision to implant it or not. Writes Gómez Montoro: “The decision does not clarify whether viability is a strictly biological term (incapacity to continue the process of cell division), or is also extended to other sorts of conditions (i.e., the withdrawal [*sic*] or inability of the progenitors to continue)” (104).

In chapter 6, “The Emergence of the Right to Life in Polish Constitutional Law,” Jerzy M. Ferenz and Aleksander Stępkowski draw a contrast between (1) the principle, “one of the darkest relics of communist rule in democratic Poland” and yet still in force today, that “women are never to be prosecuted for abortion, regardless of the stage of development of the child, the mother’s motives, or any other circumstances” (116) and (2) the Constitutional Tribunal’s anticipatory interpretation, issued on May 28, 1997, of article 38 of the Constitution of Poland, which, after a mandated *vacatio legis*, came into effect on the October 17th of the same year.

The main idea informing the Tribunal’s interpretation was what Ferenz and Stępkowski refer to as “the *Rechtsstaat* principle,” which they understand as asserting (as they put it) “the state under the rule of law” (118). In accordance with this principle, the Tribunal declared that human life must be protected regardless of its stage of development, that the health of unborn children must be protected, and that abortion for “social causes” (in effect, abortion on demand) is to be prohibited (122). Because, however, of the continued effect of the communist-inspired principle, which survives especially in a parliamentary act of August 30, 1996, Polish law, they say, “still is protecting unborn human life in a far from perfect way. There are some contradictions within statutory enactments, which introduce much inconsistency into the existing law” (128–29). As examples of such contradictory enactments, Ferenz and Stępkowski mention the “absolute impunity of the mother killing her baby before delivery” and the recognition of the “right” of a person with health insurance “to abortion performed free of charge in public hospitals” (129n52).

The central thesis of William Binchy's chapter 7, "The Unborn Children and the Irish Constitution, Including Analysis of the Role of the European Court of Human Rights," is that, even before the 2018 repeal of the Irish Constitution's eighth amendment, which had acknowledged "the right to life of the unborn," the Irish Supreme Court undermined its effectiveness by means of decisions quite incompatible with the intended sense of that amendment.

Binchy mentions two cases: *Attorney General v. X*, decided in 1992, and *Roche v. Roche*, decided in 2010. The former case concerned a fourteen-year-old girl who "became pregnant as a result of sexual abuse by a man in his forties, a friend of her family" (137). The girl and her parents decided that the girl should go to England to have an abortion. A High Court judge issued an injunction against this proposal, but the Irish Supreme Court lifted the injunction. Arguments in the case concerned the wording of the article—article 40.3.3—that had been included in the Constitution by way of the eighth amendment: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect and, so far as practicable, by its laws to defend and vindicate that right." It was claimed that the life of the young girl was threatened because, if she did not have the abortion, she might commit suicide. Although, as Binchy indicates, in article 40.3.3 the right of the fetus and the right of the mother are spoken of as equal, arguments made during the trial assumed that they were anything but. One justice spoke of the mother's right to life as "a right to a life in being," as distinct from the fetus's right which was a "right . . . to a life contingent—contingent on survival in the womb until successful delivery" (139–40).

The other case, *Roche v. Roche*, concerned assisted human reproduction, and so the right to life of the human embryo. Although the Constitution's article 40.3.3 makes no mention of abortion, the Supreme Court held in *Roche v. Roche* that "the voters, when approving of the eighth amendment, had focused on abortion and had not sought to extend its protection to unimplanted embryos." Binchy rejects this reasoning: "To restrict its protection to the context of pregnancy seemed unwarranted by (the articles') language and contrary to any philosophical or normative coherence" (142).

Juan Cianiardo's chapter 8, "The Specification of the Right to Life of the Unborn in the Inter-American Human Rights System," is about the 2012 case *Artavia Murillo et al. v. Costa Rica*, in which Costa Rica was forced by the Inter-American Court of Human Rights to alter its law regarding *in vitro* fertilization. The chapter's main argument is that "the

normative framework used by the Court to solve the case gave rise to a number of logically valid alternative solutions” to the legal difficulty that it had identified. Among the options available to the Court were several which recognized that embryos have a right to life from fertilization. The Court chose none of these, but maintained rather, on grounds inadequate both legally and philosophically, that “embryos are not human beings until implantation, and are not persons at any moment over the course of their existence as embryos.” “This contestable metaphysical concept of the person,” writes Cianciardo, “laden with highly debatable assumptions, was stated by the Court immediately after declaring solemnly that it would not do so” (180). Cianciardo is referring to paragraphs 185 and 186 of the Court’s judgment. Paragraph 185 acknowledges that “some opinions view a fertilized egg as a complete human life” and that these opinions “may be associated with concepts that confer certain metaphysical attributes on embryos.” The Court then states that to employ such concepts in its decision “would imply imposing specific types of beliefs on others who do not share them.” But in paragraph 186, it states that “the scientific evidence agrees in making a difference between two complementary and essential moments of embryonic development: fertilization and implantation.” It then argues that it is only after the second “moment” that conception can be said to have occurred.

Pilar Zambrano’s chapter 9, “A Moral Reading of Argentine Constitutional Case Law on the Right to Life before Birth,” is a very philosophical consideration of the question of how the language of foundational documents such as constitutions ought to be interpreted. With respect to the right to life, at issue are terms such as “human being” and “person”—and even sometimes the syntax of sentences (192–93). Towards the beginning of the chapter, Zambrano recommends what she calls “the ‘one-step moral reading’ interpretive methodology” (185), which she associates with the Oxford philosopher of law Ronald Dworkin. This methodology allows an interpretation to appeal to other legal documents such as international conventions. Zambrano also draws a distinction between a “loose monist system” and a “plain monist system”—the term “monist” being a reference to “one-step” interpretation. Within a loose monist system, a nation would be bound by the meanings of terms and phrases in international conventions only to the extent that it has explicitly consented to those meanings. Within a plain monist system, a nation “would also be bound by the interpretative practice jointly developed by other relevant officials of international human rights law” (194). Zambrano maintains that the Supreme Court of Argentina adopted a plain monist system in deciding three cases:

Tanus (2001), Portal de Belén (2002), and F.A.L. (2012). In the first two cases, the effects were not deleterious for the lives of the unborn; in the third, F.A.L., they were. Regarding F.A.L., says Zambrano, the Supreme Court “did not straightforwardly deny that the State is obliged to protect the *nasciturus* (unborn) as a subject of rights. Nevertheless, it warned that neither does the *nasciturus* remain entitled to an absolute right to life, nor is the state obliged to use the weight of criminal law in securing this (relative) right.” The ruling in this case is incompatible with the two earlier cases, Tanus and Portal de Belén, which were decided during what Zambrano calls “the pro-life era (2001–2012).” Towards the end of the chapter, referencing the realist logic/epistemology of Saul Kripke and Hillary Putnam, which gives reference priority over meaning, Zambrano expresses reservations regarding Dworkin’s one-step interpretive methodology—at least in as much as it might be used in order to determine the meaning of terms, such as “human being” and “embryo” as employed in ordinary discourse.

Chapter 10, “Commentary on the Constitutional Court of Chile’s Decision concerning the So-called ‘Morning After Pill,’” by Alejandro Miranda and Sebastián Contreras, is unique in this book in that it features no contradictions infecting the Chilean legal system itself. No mention is made of a 2017 decision allowing abortion in certain circumstances. (See in the present volume John Finnis’s “Concluding Reflections” [263].) Miranda and Contreras do speak of certain individuals who, arguing in favor of the morning after pill, pushed a bizarre reading of article 19 of the Chilean Constitution, which states in part that the Constitution “guarantees to all persons . . . the right to life and to the physical and psychological integrity of the person. The law protects the life of the unborn.” These individuals argued that the Constitution is here “making a distinction between (i) persons, who would be already born human individuals, and (ii) unborn human individuals, which would not yet be persons” (211). The Chilean Supreme Court rejected this interpretation.

Miranda and Contreras make a couple of suggestions with a view to rendering more coherent the Court’s interpretation of the Chilean Constitution regarding the morning after pill. For instance, faced with what it regarded as legitimate doubt as to whether the morning after pill is abortifacient, the Court invoked the principle that “one should follow the interpretation which is most favorable to the rights and guarantees inherent to the human being” (215). Miranda and Contreras argue that, in some cases where doubt regarding possible loss of life is a factor, one might risk the possible loss of life of another. They posit a case in which a

man is hunting and sees a small white object so obscured by a bush that he does not know whether it is a rabbit or a child. Such a man is obliged not to shoot. "But the situation is different if the hunter needs the rabbit to feed his son who is starving to death and knows that in the place where he is hunting the object is very likely not a child" (216). They draw a parallel with the use of the morning after pill in the case of rape and, in this regard, quote a 1999 article by John Finnis:

If a procedure such as the administration of the "post-coital pill" is undertaken for the purpose only of *preventing* conception after rape but involves some risk of causing abortion *as a side effect* (because it is not known at what stage in her cycle the woman is), there can be no universal judgment that the adoption of such a procedure is unjust to the unborn. (217; emphasis in the original)

Chapter 11, "The Right to Life in the Context of Mexican Legal Experience: From the Constitution to the Jurisprudence," by Hugo S. Ramírez García and José María Soberanes Díez, offers a glimpse into the fragmented state of Mexican legislation regarding the rights of the unborn. This fragmentation is largely the result of the federalist character of the United Mexican States—each of the thirty-two states, including now Mexico City, with its own constitution. According to the authors, eighteen of these states have decided to "recognize in their own constitutions the right to life as of the moment of conception" (228).

The chapter considers, however, primarily the legal status of the unborn not at the state but at the level of the federation itself, in particular, as contained in a number of decisions by the Mexican Supreme Court of Justice, whose jurisdiction with respect to state law is subject to various limitations. The result of this is what the authors speak of as "an ambiguous situation" even at the federal level. They draw a distinction between "law in books" and "law in action." At the level of "law in books," they say, "the right to the inviolability of human life is clearly recognized"; as a consequence, "there are good reasons to maintain that it is a truly universal right that includes all members of human kind, regardless of their condition or stage of biological development." At the level, however, of "law in action," there is a lack of clarity in the way that rules are applied. As a result of this, "the country is legally divided towards this relevant issue. In some local legal spaces, the protection of the right to life is broader and more inclusive, while in other spaces it is extremely limited and precarious" (231–32).

Chapter 12, "Legal Status of Unborn Human Life: A Case from Peru,"

by Luis Castillo Córdova, addresses directly the issue of whether, with respect to human rights, a just system of law can contain contradictions. Making use of a system of analysis invented by the German philosopher Robert Alexy, Castillo Córdova reformulates the norms implicit in a 2009 judgment by the Peruvian Constitutional Court against the free distribution of the morning after pill in public health centers. (That judgment has since been reversed.) Having completed this reformulation, Castillo Córdova then uses Alexy's own methodology of resolving what he (Alexy) regards as conflicts among rights. In the 2009 case, the conflicting rights would be the right of women to reproductive self-determination and the right of the unborn to life, understood as beginning with conception. (This last specification is important, since some defenders of the morning after pill maintain that human life begins not at conception but at implantation of the embryo in the uterus.) Alexy's methodology involves a "balancing" of the supposedly conflicting rights in an effort to determine which has preference. "Applying a balancing test to this case," says Castillo Córdova, "will thus, either result in a technical tie between both rights, or in a slight victory for the right to life of the unborn child" (250).

Castillo Córdova characterizes this result as "fuzzy" and proposes an alternative way of determining what would be the correct—the just—judgment. This alternative approach assumes that a constitution is in itself a complex but coherent unity:

If the Constitution is seen, not as a set of unrelated norms, but as a unique norm (principle of unity) with different coherent, non-contradictory sections (principle of systematicity), this means that, if the essential or constitutional content of the right to life has been sufficiently explained, the constitutional or essential content of the right of women to reproductive self-determination cannot logically be in contradiction with the right to life. (250)

Citing Aristotle, Castillo Córdova calls this alternative approach "teleological." It presumes that the final purpose of a constitution is to frame "the social conditions for the Good, which is perfection for the human being or, what is the same, the satisfaction of all her essential needs (i.e., those that spring from her essence)." Adopting this approach, says Castillo Córdova, we can conclude that "creating any kind of risk to unborn life is beyond the proper limits of the right of women to reproductive self-determination" (250–52).

The book finishes with the aforementioned contribution by Finnis

entitled “Unborn Human Life and Fundamental Rights: Concluding Reflections.” These very philosophical concluding reflections do not focus upon contradictions in the legal systems treated in the book; they consider rather primarily one of the major causes of these contradictions: judicial overreach. Finnis says that such overreach is most evident when legislation that is overturned “was not merely in force at the time of the adoption of the constitution or charter of rights, but peacefully and uncontroversially in force” (260). He also criticizes “conservative judges willing to defend laws restricting abortion” but who “have relied on arguments about the usurpation of judicial power, or about the impropriety of overriding the authority of state/provincial legislatures” rather than basing themselves upon “a proper juridical assessment of the boundaries of the key juridical category *person*” (263, emphasis original). (The name of United States Supreme Court Justice Antonin Scalia comes to mind.)

At one point, Finnis criticizes legal systems that speak of respecting the right to life of both mother and unborn child and prohibit killing the unborn except in order to save the life of the mother. “For even though the law of many Christian nations has been framed in that sort of way,” he writes, “the formula implies that it is sometimes right to choose precisely to kill as a means to a (good) end. And when one chooses something (e.g., to kill) as a means, one is intending that (e.g., intending to kill)” (258). Within a couple of paragraphs, he argues that “it is neither homicidal nor unjust to perform a craniotomy in order to make it possible to remove an unborn child from the birth canal to save the life of the mother, even if the procedure immediately kills the child by crushing and emptying its skull” (258–59). N.V